Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-

82-163

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN BROADLEY
General Counsel
HENRI F. RUSH
Associate General Counsel
EDWARD J. O'MEARA
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

QUESTIONS PRESENTED

In this case the Interstate Commerce Commission declined to suspend or to investigate a rate proposed by a railroad pursuant to a statutory provision enacted in the Staggers Rail Act of 1980 to permit railroads to impose surcharges on traffic moving to and from their light density lines to insure that the railroad can earn up to a specified level of its costs of providing service to and from such lines. The court of appeals enjoined the Commission from allowing the rate to go into effect and held, *inter alia,* that despite the general rule that Commission decisions not to suspend a rate are generally not reviewable (see, *Southern Ry.* v. *Seaboard Allied Milling Corp.,* 442 U.S. 444 (1979)), it has jurisdiction over *this* Commission action because of its authority under the All Writs Act, 28 U.S.C. 1651(a), to protect its jurisdiction over an abandonment proceeding then before the Commission following remand from the court of appeals. The court of appeals also ordered the Commission to conduct a hearing to determine the "appropriateness" of the proposed rate consistent with its opinion.[1]

---

[1]Respondents are City of Cherokee, Iowa, Farmers Co-op, Archer Co-op, Calumet Feed Service, Metz Baking Company, Ray Holder Agg Lime Service, Rowena Elevator & Mill, C. S. Agro Corp., Farmer's Co-op of George, Iowa, Boyden Agg Lime, and M. S. Stuckey.

The questions presented are:

1. Whether the court of appeals properly invoked jurisdiction to review the Commission's decision not to suspend and not to investigate a carrier-initiated rate proposal despite the general rule against reviewability of such Commission decisions;

2. Whether the court of appeals may properly order the Commission to conduct, in effect, an investigation to determine the lawfulness of a proposed rate where the Commission itself declined to do so.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	15
APPENDIX A	1a
APPENDIX B	10a
APPENDIX C	12a
APPENDIX D	13a
APPENDIX E	14a

TABLE OF AUTHORITIES

CASES:

	Page
Aberdeen and Rockfish R. R. Co. v. *United States*, 664 F.2d 41 (5th Cir. 1981)	10
Arrow Transportation Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963)	8, 11
Atchison, T. & S.F.R. Co. v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973)	11
City of Cherokee v. *I.C.C.*, 641 F.2d 1220 (8th Cir. 1981)	5
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, 449 U.S. 607 (1981)	8
FTC v. *Dean Foods Company*, 384 U.S. 597 (1966)	12
Henderson-Princeton Rail Retention Committee v. *ICC*, No. 81-3412 (6th Cir. Jan. 22, 1982)	10
Kerr v. *United States District Court*, 426 U.S. 394 (1976)	11
Michigan Packaging Corporation v. *I.C.C.*, 665 F.2d 1045 (6th Cir. 1981)	10
Mississippi Public Service Comm'n v. *ICC*, 662 F.2d 314 (5th Cir. 1981)	10, 12
People of the State of Ill. v. *ICC*, 660 F.2d 289 (7th Cir. 1981)	10

CASES—Continued

	Page
Southern Ry. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)	*passim*
Standards For Railroad Revenue Adequacy, 364 I.C.C. 803 (1981), *petition for review pending sub nom. Bessemer and Lake Erie Railroad Co.* v. *I.C.C.*, No. 81-1492 (3rd Cir.)	2
United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966)	14
United States v. *SCRAP*, 412 U.S. 444 (1973)	8
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978)	14
Will v. *United States*, 389 U.S. 90 (1967)	11

STATUTES:

Interstate Commerce Act:

49 U.S.C. (Supp. IV) 10704(a)(2)	2
49 U.S.C. (Supp. IV) 10705a(b)	*passim*
49 U.S.C. (Supp. IV) 10705a(b)(1)	2
49 U.S.C. (Supp. IV) 10705a(b)(1)(A)	2
49 U.S.C. (Supp. IV) 10705a(b)(2)	3
49 U.S.C. (Supp. IV) 10705a(b)(3)(A)	4
49 U.S.C. (Supp. IV) 10705a(b)(6)	3, 5
49 U.S.C. (Supp. IV) 10705a(g)(3)	4-5
49 U.S.C. (Supp. IV) 10707(c)	3-4
49 U.S.C. (Supp. IV) 10903 *et seq.*	5
49 U.S.C. (Supp. IV) 11701(b)	4, 7, 9, 13

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895	2, 3
28 U.S.C. 1254(1)	1
28 U.S.C. 1651(a)	7, 10, 11, 12
28 U.S.C. 2350(a)	1

REGULATIONS:

49 C.F.R. 1121.40 *et seq.*	3

MISCELLANEOUS:

H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980)	13

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 671 F.2d 1080. The notice of action by Division 1 of the Interstate Commerce Commission (App. D, *infra*, 13a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a-11a) was entered on February 17, 1982. The Commission's timely petition for rehearing was denied on March 31, 1982 (App. C, *infra*, 12a) On June 21, 1982, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to July 30, 1982. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of 49 U.S.C. (Supp. IV) 10705a(b) and 28 U.S.C. 1651 are set forth at App. E, *infra*, 14a-17a.

STATEMENT

1. The Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (October 14, 1980) added new Section 10705a to the Interstate Commerce Act (the Act). This provision substantially modified the Act with respect to joint rates and revenue divisions. In particular, new Section 10705a(b) authorizes rail carriers to file and collect surcharges for transportation services they perform on "light density rail lines."[2] They may do so "without the concurrence of any rail carrier," 49 U.S.C. (Supp. IV) 10705a(b)(1), thus allowing carriers unilaterally to increase their divisions on joint rate/through routes—a practice formerly proscribed by the Act.

If a carrier is "not earning adequate revenues", as determined under Section 10704(a)(2),[3] the carrier may file and collect a surcharge on its light density rail line if it currently earns less than a specified level of revenue for shipments it transports to and from the line. 49 U.S.C. (Supp. IV) 10705a(b)(1)(A). The statute identifies the specified level of revenue as revenue equal to 110 per-

---

[2]"Light density rail line" is a shorthand reference to a line that "carried less than 3 million gross ton miles of traffic per mile in the most recent calendar year for which traffic data is available." 49 U.S.C. (Supp. IV) 10705a(b)(1)(A). Petitioners below did not contest that the line at issue in this case is a light density rail line.

[3]The Commission has in fact determined that the involved rail carrier—Illinois Central Gulf Railroad Company—is not earning "adequate revenues" pursuant to Section 10704(a)(2). *Standards For Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *petition for review pending sub. nom. Bessemer and Lake Erie Railroad Co.* v. *I.C.C.*, No. 81-1492 (3rd Cir.)

cent of the variable cost of transporting the traffic to or from the line *plus* 100 percent of the carrier's "reasonably expected costs" of continuing to operate the line.[4] 49 U.S.C. (Supp. IV) 10705a(b)(2). There are no other statutory conditions concerning a rail carrier's authority to make surcharges other than the specified jurisdictional limit.

Shippers may ask the Commission to suspend the application of a surcharge so that it does not take effect on the proposed date. 49 U.S.C. (Supp. IV)10705a(b)(6). However, the Commission may—but is not required to—suspend a proposed surcharge only if the protesting shipper "demonstrates to the Commission that, after application of the surcharge, the surcharging carrier's revenues exceed 110 percent of such carrier's variable cost of transporting all traffic to or from such line plus such carrier's reasonably expected costs of continuing to operate such line."[5] Section 10705a(b)(6) also provides that if such demonstration is made by a protesting ship-

---

[4]The statute at 49 U.S.C. (Supp. IV) 10705a(b)(2) directs the Commission to complete a proceeding to define the term "reasonably expected costs" within 120 days after the effective date of the Staggers Act. Upon passage of the Staggers Act (effective October 1, 1980), the Commission started to develop the required standards. The Commission issued its proposed rules in Ex Parte 402, *Reasonably Expected Costs*, 46 *Fed. Reg.* 9670 (January 29, 1981). On July 15, 1982 the Commission approved final rules; *Federal Register* publication is presently scheduled for August 4, 1982. Prior to promulgation of the final rules, the Commission has used as its interim rules the previously established Rail Services Planning Office (RSPO) subsidy standards, set forth at 49 C.F.R. 1121.40 *et. seq.* Indeed, the Staggers Act requires that the RSPO subsidy standards be used as interim rules. 49 U.S.C. (Supp. IV) 10705a(b)(2).

[5]This demonstration must be made "in addition to the matters required by [Section 10707(c)]." 49 U.S.C. (Supp. IV) 10705a(b)(6). Section 10707(c) states that the Commission may not suspend a proposed rate unless the protestant shows that—

per, "the Commission may suspend the application of *only so much of the surcharge* as will produce revenues in excess of the amount so demonstrated" (emphasis added).

If the Commission chooses not to suspend, shippers have two means under the statute by which to challenge the surcharge. First, upon petition of a shipper on the affected line, the Commission may cancel the surcharge if the shipper shows that, after application of the surcharge, the carrier's revenue exceeds the specified revenue level. 49 U.S.C. (Supp. IV) 10705a(b)(3)(A).

Second, shippers (or any person) may file a complaint with the Commission pursuant to 49 U.S.C. (Supp. IV) 11701(b), alleging that the surcharge violates either Section 10705a(b) or any other provision of the Interstate Commerce Act. The Commission would hold a hearing on the complaint, and if it determined that the surcharge was unlawful, would award damages where appropriate.[6] The Commission's decision on the complaint is subject to judicial review.

2. In April 1981, the Illinois Central Gulf Railroad (ICG) published a proposed surcharge, pursuant to Section 10705a(b), of $1,004.00 per car on shipments to or from its Sioux Falls District line.

(A) it is substantially likely that the protestant will prevail on the merits;

(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section [requiring carrier to account for amounts received under the increase during investigation] do not protect the protestants.

[6]Significantly, however, Section 10705a(g)(3) limits remedies when application of a light density lines surcharge is found to violate any provision of the Act.

Petitioners below protested the surcharge and requested the Commission to reject the surcharge or, if it did not reject it, to suspend the rate pending investigation. Petitioners below did not attempt to make the showing required under Section 10705a(b)(6) before the Commission may suspend a surcharge. They alleged instead, *inter alia*, that the surcharge constituted a *de facto* abandonment of the rail line and violated the court of appeals' mandate remanding the Commission's earlier decision authorizing ICG to abandon the same line. 49 U.S.C. (Supp. IV) 10903 *et seq.*[7]

3. The Commission's Suspension Board declined to suspend or to investigate the surcharge. The Commis-

---

Section 10705a(g)(3) (emphasis added):

> (3) Except as provided in subsection (i), (j), or (k) [dealing with complaints by Class III carriers] of this section, *if the application of a surcharge or the cancellation of the application of a joint rate under this section is found to constitute a violation of any provision of this title,* such violation shall not be ordered remedied in any manner which—
>
> (B) which requires the carrier applying a surcharge under subsection (b) of this section to provide service over the route to which such surcharge applies in a manner that provides revenues to such carrier that are less than 110 percent of such carrier's variable cost of transporting the traffic involved to or from the line to which the surcharge applies, plus such carrier's reasonably expected costs of providing service over such line.

[7]In *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220 (8th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3278, the court of appeals remanded the Commission's decision authorizing abandonment on two grounds: (1) the Commission had improperly found labor expenses to be "avoidable costs" following abandonment; and (2) the Commission had not properly weighed the competing burdens/benefits of both the carrier and the affected communities. The reopened hearings have been completed and final Commission action is now pending.

sion's Division 1 (a 3-member panel of the Commission), following reconsideration of the Suspension Board's decision, also declined to suspend or investigate the proposed rate. Prior to the rate's effective date, however, petitioners sought, and obtained, from the court of appeals an order staying the effectiveness of the surcharge. The court directed the Commission to suspend the rate "until further order" of the court. Circuit Justice Blackmun in Docket No. A-45 subsequently denied ICG's motion to stay the court of appeals' stay decision.

4. On judicial review, a panel of the court of appeals enjoined ICG from "implementing" the surcharge and remanded the proceeding to the agency for a full hearing to determine the "appropriateness" of the rate increase (App. A, *infra*, 1a-11a).

The court first determined that the surcharge dispute "arises in connection with the abandonment proceedings" previously reviewed by the court and remanded to the Commission for further consideration (*id.* at 2a). The court then summarized the procedural history of the abandonment, and discussed the effects that abandonment of the line would have on the affected communities (*id.* at 3a).

Although the court rejected the petitioners' *de facto* abandonment argument—concluding that the only statutory criteria for a surcharge is the 110%/100% formula (*id.* at 5a-6a)—it reasoned that ICG deliberately tried to interfere with the court's remand on the abandonment question, given the "magnitude and timing" of the carrier's proposed surcharge (*id.* at 3a-4a). Therefore, although the court acknowledged the general rule that Commission decisions not to suspend tariffs are not reviewable under *Southern Ry.* v. *Seaboard Allied Milling*

Corp., 442 U.S. 444 (1979),[8] the panel claimed its jurisdiction arose from another "source": its power under the All Writs Act, 28 U.S.C. 1651(a), to review "the surcharge" in order to protect its jurisdiction over the remanded (and pending) abandonment (*id.* at 4a).

Petitioners before the Commission did not attempt to satisfy the statutory criteria governing light density lines surcharges. The court found, however, that petitioners in fact had no "opportunity" to show that the surcharge is above the statutory standard because the Commission had not promulgated final rules defining the "reasonably expected cost" component of the standard (*id.* at 6a-7a). Therefore, the court ordered the Commission to hold a hearing to allow the carrier and petitioners to submit evidence on the issue so that the Commission may determine the *permissibility* of the rate (*id.* at 8a). The court enjoined the railroad from implementing the tariff until the Commission makes that determination.

Petitioners have not yet filed a complaint under 49 U.S.C. (Supp. IV) 11701(b) [former Section 13(1) of the Interstate Commerce Act] which would entitle them to a full Commission inquiry into the lawfulness of the tariff.

REASONS FOR GRANTING THE PETITION

1. The court's decision in effect suspends the proposed surcharge and directs the Commission to undertake an investigation into its lawfulness. By its action, the court of appeals does what this Court has explicitly and repeatedly determined it may not, *i.e.*, impinge on the Commission's exclusive jurisdiction over rate suspension matters.

---

[8]The court conspicuously omitted reference to the rule of nonreviewability as it relates to decisions not to investigate a tariff. In fact, *Seaboard Allied, supra*, involved a Commission decision not to order a hearing to investigate the lawfulness of a rate increase.

This Court has squarely held that courts lack jurisdiction to review non-final actions of the Commission suspending and investigation, or declining to suspend and investigate, rate increases filed by common carriers, or to enjoin increases which the Commission permitted to become effective.

In *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 667 (1963), this Court ruled that the Commission has "the *sole and exclusive power* to suspend" new rates, and the judiciary was stripped of "any pre-existing power to grant injunctive relief" (emphasis added). In *Arrow*, this Court also held that a court could not enjoin a railroad from implementing a rate tariff after the Commission had suspended the tariff for the maximum period provided by the statute. Similarly, in *United States* v. *SCRAP*, 412 U.S. 669 (1973), this Court held that courts lack jurisdiction to review a Commission action declining to suspend a carrier-initiated tariff.

More recently, in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), this Court reversed an Eighth Circuit decision which enjoined a rate increase and sought to review a Commission decision terminating an investigation, on the ground that courts lack jurisdiction to review a non-final Commission decision declining to investigate a carrier-initiated tariff, even upon charges of a "patent illegality" (442 U.S. at 451).[9]

The clear and continuing Congressional purpose—as explained by this Court's numerous decisions—to oust the judiciary from impinging on the Commission's ex-

[9]In conformity with the rationale of these decisions, this Court has also held that courts cannot enjoin railroads from filing rates following a Commission investigation even where the standards used by the Commission to determine the lawfulness of the rates were found to be inadequately explained by the Commission thus necessitating a remand. See *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 607 (1981).

clusive suspension powers, is entirely applicable to this case.

First, the surcharge at issue in this case constitutes a carrier-initiated rate increase. As the foregoing decisions make clear, it is within the sole and exclusive province of the Commission to determine whether—and, if so, when—such an increase is to become effective. As the Court held in *Seaboard Allied, supra,* 442 U.S. at 458 n. 11:

> [I]t is conceded by all that the Commission has authority with respect to rates such as those at issue either to suspend (or investigate) them and that it has exercised its authority. The question raised is *whether it did so correctly* under the particular circumstances involved—a question that cannot be answered by a reviewing court without "independently apprais[ing] the [lawfulness] of the rat[e]." (Brackets in original, emphasis supplied).

Second, as in the foregoing cases, available administrative remedies have not been exhausted and the Commission's decision declining to suspend or investigate the surcharge is not final. Under the provisions of 49 U.S.C. (Supp. IV) 10705a, the shippers could have, and may still, attempt to establish that the rate including the surcharge exceeds the statutory standards applicable to light density line surcharges. If the shippers were to demonstrate that the surcharge exceeds that standard, the Commission could (but would not be required to) *cancel* that portion of the surcharge which exceeds the statutory standard. Petitioners below are also able to institute a complaint proceeding under 49 U.S.C. (Supp. IV) 11701 to review the lawfulness of the surcharge.

On these grounds, and on the basis of the authorities discussed above, the Courts of Appeals for the Fifth, Sixth, and Seventh Circuits have squarely held that Commission actions declining to suspend and investigate light density line surcharges filed under 49 U.S.C. (Supp.

IV) 10705a(b) are not reviewable.[10] The court's decision to review the Commission's nonfinal decision declining to suspend or investigate the surcharge, and to enjoin ICG from implementing the surcharge, is in direct conflict with these decisions as well as this Court's precedent. Certiorari should be granted to remedy this conflict.

2. The court's reliance on the All Writs Act as a "source" of jurisdiction to review the Commission's action is not a proper exception here to the general rule against reviewability.[11] We do not dispute that the court has jurisdiction over the pending abandonment proceeding and that it may, in appropriate circumstances, rely on

---

[10]See, *Mississippi Public Service Comm'n* v. *ICC*, 662 F.2d 314 (5th Cir. 1981) (dismissing a petition for review and dissolving an emergency stay as to a surcharge proposed to apply to a branch line which was the subject of abandonment proceedings then pending before the Fifth Circuit on petition for review); *Aberdeen and Rockfish R.R. Co.* v. *United States*, 664 F.2d 41 (5th Cir. 1981); *Michigan Packaging Corporation* v. *ICC*, 665 F.2d 1045 (6th Cir. 1981) (dismissing petitions for review of a light density line surcharge because, under *Seaboard Allied*, "petitioners will be able to obtain full review at a later date and will be able to recover any charges the I.C.C. determines to be excessive"); *Henderson-Princeton Rail Retention Committee* v. *ICC*, 6th Cir., No. 81-3412 (dismissed Jan. 22, 1982); *People of the State of Ill.* v. *ICC*, 660 F.2d 289 (7th Cir. 1981) (denying a stay of a light density line surcharge alleged to be a *de facto* abandonment, because under *SCRAP-Arrow*, courts are barred " 'from entering disruptive injunctions against collection of rates not finally declared lawful or unlawful by the ICC' ").

[11]The court's opinion appears to rely upon a purported distinction between an order "that the ICC suspend the surcharge" and an injunction "directed to the ICG" not to implement the surcharge (App. A, *infra*, 8a-9a). Such a distinction is without merit. In *Arrow*, *supra*, this Court held that the railroads could *not* be enjoined by a court from implementing a rate increase after the Commission-imposed suspension period had elapsed.

the All Writs Act to take such actions as may be necessary to protect that jurisdiction. We submit, however, that preventing the tariff from taking effect is in no way necessary to preserve the court's jurisdiction. The effectiveness of ICG's surcharge is legally unrelated to its application for abandonment as the court itself appeared to recognize in rejecting petitioners' *de facto* abandonment argument (App. A, *infra*, 5a-6a).

The legal premise of the court's decision is incorrect. As this Court explained in *Arrow, supra*, 372 U.S. at 671, n. 22, the "limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction . . . has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." Similarly, in *Atchison, T & S.F.R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 819 (1973)—the very case cited by the court in support of its alleged power to review and enjoin (App. A, *infra*, 4a)—this Court held that the reviewing court should not exercise its general equitable powers "to the extent that it might substantially interfere with the function of the administrative agency" and that the power to issue a stay " 'does not mean . . . that its exercise should be without regard to the division of functions which the legislature has made between the administrative body and the court of review.' "

The court's invocation of the All Writs Act in support of its decision violates the standards which have been held to circumscribe the issuance of writs under the statute. Use of exceptional writs is limited to "exceptional circumstances" involving some "usurpation of power", *Will* v. *United States*, 389 U.S. 90, 95 (1967), and where "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires," *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Neither of these criteria is satisfied in this case;

no finding has been made that the Commission has in any way acted in excess of its lawful authority and, as noted above, petitioners below have adequate remedies before the Commission which they have failed to pursue.

The Fifth Circuit recently addressed the issue of its power under the All Writs Act to assert jurisdiction over an ICG light density line surcharge in order to preserve its jurisdiction over a pending abandonment. In *Mississippi Public Service Comm'n* v. *ICC*, 662 F. 2d 314, 320 (5th Cir. 1981), the court stated (emphasis added):

> We do not believe that the issuance of a writ under §1651 would be appropriate in this case. Issuance of such a writ is particularly inconsistent with Congress' intent not to have courts review such non-final Commission orders. We therefore refuse to exercise any discretion which we might have under §1651. See *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). *Petitioners have failed to demonstrate that review of the Commission decision in the abandonment case is in any way precluded by the absence of a stay of the surcharge.*

Likewise, there has been no showing in the instant case that review of the abandonment case is in any way precluded by the absence of a stay.[12] The court supports its holding by concluding that ICG imposed the rate in "bad

---

[12]The court attempts to distinguish the Fifth Circuit's holding on the ground that the abandonment proceedings involving the surcharged line were not pending before that court (App. A, *infra*, 5a-6a). This distinction is plainly unsound. In its decision, the Fifth Circuit expressly noted that "there is pending before this Court . . . a petition for review of a decision by the Commission . . . authorizing the abandonment by ICG of the line." 662 F.2d at 315.

In any event, there is no particular significance to the point that there the abandonment appeal had been perfected. Authority under the All Writs Act "extends to the potential jurisdicition of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Company*, 384 U.S. 597, 603 (1966). Therefore, the considerations in *Mississippi*, *supra*, and the instant case are the same.

faith" and with the "intent" to interfere with the court's jurisdiction, pointing to the "magnitude and timing" of the surcharge (App. A, *infra,* 4a, 9a). However, this surcharge is one of many of similar magnitude that ICG imposed at around the same period.[13] The ICG's management program of seeking surcharges on many light density lines undercuts the court's conclusion that this one rate was "intended" to interfere with the court's jurisdiction.[14]

This Court should issue a writ of certiorari in order to resolve the conflict that now exists between the circuits over the proper exercise of judicial discretion under the All Writs Act to review non-final Commission actions that are generally held by this Court to be unreviewable.

3. Absent a formal complaint by petitioners under 49 U.S.C. (Supp. IV) 11701(b), only the Commission has the power to determine whether or not to institute an investigation into the lawfulness of the surcharge. *Seaboard Allied, supra,* 442 U.S. at 455-456. Petitioners below have not filed a complaint. Despite that clearly enunciated principle, the court remanded the case to the Commission and ordered the agency to conduct a hearing

---

[13] *E.g.,* Suspension Case No. 70270, $495/car involving named stations in Mississippi, effective 2/1/81; Suspension Case No. 70450, $534/car on line in Mississippi, effective 6/20/81; Suspension Case No. 70481, $395/car involving line in Illinois, effective 7/18/81; Suspension Case No. 70482, $915/car on line in Kentucky, effective 7/18/81; Suspension Case No. 70575, $275/car on line in Mississippi, effective 10/3/81.

[14] The revenue evidence in the abandonment proceeding was nearly four years old at the effective date of the surcharge. One of the purposes of the new surcharge provisions was to permit revenue-needy carriers to quickly implement rate increases to cover *current* costs. The cost formulas were prescribed to avoid delay. H.R. Rep. No. 1430, 96th Cong., 2nd Sess. 112 (1980).

on the lawfulness of the surcharge.[15] In effect, the court orders the relief petitioners sought before the Commission—an investigation of the proposed surcharge. Such action is contrary to the holding in *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966), wherein this Court precluded a lower court from ordering the agency to grant the requested relief.

By ordering the Commission to investigate the lawfulness of the surcharge, the court engrafted its own notion of proper agency procedure upon the Commission, and therefore improperly intruded into the agency's well-defined decisionmaking process contrary to the holding in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-558 (1978).

We submit that the court of appeals clearly acted outside the scope of its authority and that its order requiring the Commission to institute an investigation into the lawfulness of the proposed surcharge must be overturned on review.

---

[15]Language in the panel's decision clearly envisions a formal "investigation" into the rate's "lawfulness" without actually using those words. The panel orders a "hearing" at which the parties are to submit evidence on whether the surcharge is "proper" (App. A, *infra*, 3a), "permissible" (*id.* at 8a) and "appropriate" (*id.* at 9a). The Commission is then directed to make a "determination" following the hearing, and in fact ICG is enjoined from implementing the rate—tantamount to a suspension—until the agency makes that determination (*id.* at 3a, 9a).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the errors in the opinion of the court of appeals are so plain that this Court might properly consider summary disposition on the merits under Rule 23.1.

Respectfully submitted.

JOHN BROADLEY
General Counsel
HENRI F. RUSH
Associate General Counsel
EDWARD J. O'MEARA
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

JULY 1982